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In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. [redacted] 350

DAVID A. RUHL,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Constitutional Provision Involved	4
Questions Presented For Review	5
Statement Of The Case	6
Reasons Relied Upon For Allowance Of The Writ	9
Summary Of Argument	9
Argument	10
I. The United States Is Not A "Person" Within The Meaning Of The Act	10
II. The Act Deprives Petitioner Of His Property Without Due Process Of Law In Violation Of The Fifth Amendment	16
III. Applying The Ordinary Rules Of Statutory Construction, The Federal Agency Rather Than The United States Would Be The "Last Person" Employing Petitioner Under The Act	32
Conclusion	35
Opinion Of The United States Court Of Appeals	1a-6a

List Of Authorities Cited.

Cases

Atlanta v. Anglin, 209 Ga, 170, 71 S.E. (2d) 419 26
Bakerhus v. Seattle, 1956, 46 Wn. (2d) 695, 296 P. (2d) 536 ..... 22, 25
Bower v. Los Angeles, 118 Cal. App. (2d) 297, 257 P. (2d) 672 ..... 22, 26
Burke v. Railroad Retirement Board, 165 F. 2d 24 16
Davis v. Pringle, 1924, 1 F. 2d 860 14
Georgia v. Evans, 1942, 316 U.S. 159 15
McBride v. Allegheny County Retirement Board, 1938, 350 Pa. 402 ..... 22, 24, 33
Ohio v. Helving, 1934, 292 U.S. 360 15
Railroad Retirement Board v. Alton R. Co., 1934, 295 U.S. 330 ..... 21, 22
Scott v. Railroad Retirement Board, 1955, 227 F. 2d 684 19
Stouper v. Jones, 1960, 284 F. 2d 240 20
Title Guaranty & Surety Co. v. Guarantee Title & T. Co., 1909, 174 Fed. 385 14
United States v. Bush, 255 F. 2d 791 27
United States v. California, 1936, 297 U.S. 175 15
United States v. Cooper Corp., 1940, 312 U.S. 600 13
United States v. Fox, 1876, 94 U.S. 316 13
United States v. Mine Workers, 1946, 330 U.S. 258 13

Others

Fifth Amendment to the Constitution of the United
Title 1, Section 1, U.S.C.A. 11, 12
Title 45, Sections 228a-y, U.S.C.A. (Railroad Retirement Act of 1937) 3, 10
Title 45, Section 229, U.S.C.A. 16, 17
States 4
Vance on Insurance, Third Edition (Anderson) 19, 23
4 Williston On Contracts, 3rd Ed., (Jaeger), Sec. 615, pp. 597-630, Supp. pp. 14-15 23
13 C.J. 560 23

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of The United States:

The petitioner, David A. Ruhl, by Anthony DiGrazia, Harry A. Carlson, and Hugh M. Matchett, his attorneys, prays that the court will issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court affirming a final decision of the Railroad Retirement Board denying petitioner's application for an annuity under the Railroad Retirement Act of 1937.

OPINIONS BELOW

The opinion of the United States Court of Appeals is published as 342 F. 2d 662. It is set out in the Appendix.

The Railroad Retirement Board wrote an opinion. It has not been published. The important parts are set forth in the Statement of the Case.

JURISDICTION

Jurisdiction of this Court is based on 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1).

Jurisdiction of the Court of Appeals was predicated on 45 U.S.C. § 228k, 45 U.S.C.A. § 228k, which incorporates the judicial review provisions of 45 U.S.C. § 335(f), 45 U.S.C.A. § 335(f). The judgment of the Court of Appeals was entered February 25, 1965, and became final on April 5, 1965, on denial of a timely petition for rehearing.

This petition for writ of certiorari is due to be filed on or before July 5th, 1965.

STATUTE INVOLVED.

RAILROAD RETIREMENT ACT OF 1937

§ 228a. Definitions

For the purposes of sections 228a to 228c—1, 2288e-228h, 228i—228p, 228r, and 228s of this title—

* * *

(n) The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

§ 228b. Eligibility for annuities; time of accrual; spouses' annuity

(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

* * *

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in sub-divisions 4 and 5 of subsection (a) of this section prior to attaining age sixty-five.

(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the individual entitled thereto), but—

• • •

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service.

• • •

CONSTITUTIONAL PROVISION INVOLVED.

Fifth Amendment to the Constitution of the United States:

"No person shall be • • • deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States is a person within the meaning of section 228a(n) and section 228b(a)(b) and (d) of the act.

2. Assuming that the United States is a person within the meaning of sections 228a(n) and 228b(a)(b) and (d) of the act, whether said provisions are unconstitutional as violating the Fifth Amendment of the Constitution of the United States, as being a denial of due process because they arbitrarily and unreasonably deprive a person of property without just compensation, and impair the obligation of a valid contract.

3. Whether the United States Government Agency in which petitioner was employed is the person by whom he was last employed, within the meaning of section 228b (a)(b) and (d) of the act.

STATEMENT OF THE CASE

Petitioner filed his application for an annuity with the Railroad Retirement Board on January 29, 1962.

The application stated and the Board found (R. Page 8) that petitioner last worked for an employer under the Act in March, 1948; that petitioner was sixty-five years of age on March 3, 1961; and that petitioner is and has been employed by the Ordnance Ammunition Command and U. S. Army Ordnance Corps since January, 1953.

On March 8, 1962, the Bureau of Retirement Claims denied petitioner's application for an annuity until such time as he ceased work with the Ordnance Ammunition Command and the U. S. Army Ordnance Corps, as this employment constituted last person service within the meaning of the Railroad Retirement Act and that before his annuity could begin to accrue, petitioner must cease work with and relinquish his rights with his employer (R. Page 38).

On August 10, 1962, petitioner notified the Board in writing (R. Page 48) that his employment with the Ordnance Ammunition Command and U.S. Army Ordnance Corps was terminated on July 31, 1962, and that he had relinquished all rights with these employers; and that on August 1, 1962, he was appointed to the United States Army Munitions Command.

On August 20, 1962, the Bureau of Retirement Claims again denied petitioner's application for an annuity, stating:

"Your letter of August 10, 1962, states that you terminated your employment as engineer with the Ordnance Ammunition Command and the U. S. Army Ordnance Corps on July 31, 1962, and you request that your application for an annuity now be considered. You also informed us that you have started working for the U.S. Army Munitions Command of Dover, New Jersey.

Since the United States Federal Government is your 'last person' employer, and the U.S. Army Munitions Command is a department of the U.S. Government, you cannot qualify for an annuity until you terminate your employment for the U. S. Government and relinquish such rights as you may have to return to work. For this reason, no consideration can be given your application at this time.

Yours very truly,
D. M. Smith
Director of Retirement Claims"

On February 12, 1963, petitioner filed his appeal to the Appeals Council of the Railroad Retirement Board.

On April 9, 1963, Appeals Council held a hearing on his Appeal. (R. Pages 68-97).

On April 26, 1963, Appeals Council rendered the following decision:

"* * * it is the decision of the Appeals Council that the appellant must cease to render compensated service to the United States Government before an annuity under the Railroad Retirement Act may begin to accrue to him."

On May 29, 1963, petitioner filed an appeal with the Railroad Retirement Board from the decision of the Appeals Council.

On July 31, 1964, the Railroad Retirement Board affirmed the decision of the Appeals Council and made the following findings of fact in support of its decision:

"4. In working for the Ordnance Ammunition Command, the United States Ordnance Corps, and the United States Munitions Command, appellant was employed by the United States.

"5. Appellant began his employment with the United States in January 1953 and is still employed by the United States.

"6. The United States was the 'last person' within the meaning of the Act, by whom appellant was employed.

"7. An annuity cannot begin to accrue to appellant until he terminates his service for the United States and relinquishes all his rights to return thereto.

DECISION

The decision of the Appeals Council is affirmed."

On July 31, 1964 he filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit under the authority of 45 U.S.C. §228k, 45 U.S.C.A. §228k, which incorporates the judicial review provisions of 45 U.S.C. §335(f), 45 U.S.C.A. §335(f). On February 24, 1965, the Court of Appeals affirmed the decision of the Railroad Retirement Board. Petitioner filed a petition for rehearing. On April 5, 1965, his petition for rehearing was denied. His time in which to file a petition for writ of certiorari in this Court will expire July 5, 1965.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Court of Appeals has decided the questions above set forth adversely to Petitioner, and they are important questions of federal law which have not been, but should be, settled by this court.

SUMMARY OF ARGUMENT.

In this summary the word Act refers to sections 228a(n) and 228b(a)(b)(d) of the Railroad Retirement Act of 1937.

Petitioner is entitled to his annuity because neither the United States nor any agency thereof is a person within the meaning of the Act, and, in any event, the agency and not the United States itself would be the "last person" by whom he was employed. Otherwise, the Act is unconstitutional as being a violation of the Fifth Amendment by requiring petitioner to relinquish his persent Federal employment and such rights as he may have to return to the service of the United States, said requirement being arbitrary and unreasonable, impairing the obligation of a contract, depriving petitioner of his property without just compensation, and depriving him of his property without due process of law.

ARGUMENT.

I.

The United States Is Not A "Person" Within The Meaning Of The Act.

The Act of August 29, 1935, c. 812, 49 Stat. 967 to 974, known as the Railroad Retirement Act of 1935, was amended in its entirety by the Act of June 24, 1937, c. 382, part I, Section 1, 50 Stat. 307 to 319, known as the Railroad Retirement Act of 1937 (Title 45, Sections 228a-y U.S.C.A.). Section 228a(n) was amended to read as follows:

> "The term 'person' means an individual, a partnership, an association, a joint-stock company, or a corporation."

Section 228b(a) and (d) was amended to read:

> "(a) The following described individuals, if they shall have been employees on and after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1 (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):
>
> * * * (b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2 (b) and subdivision 3 of subsection (a) prior to attaining age sixty-five. * * *

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service."

The provisions quoted are not found in the Railroad Retirement Act of 1935.

The issue is, Is the United States a person within the meaning of the Act?

Petitioner has no quarrel with the view that a statute which does not expressly refer to governmental bodies will, nevertheless, apply to such bodies if it was *intended* to apply to them. But, in determining the legislative intent of the Sovereign in enacting any particular act, it is presumed that, in the absence of any express provision stating that the statute does apply to it, the Sovereign did not *intend* the statute to apply to it.

Title 1 Sec. 1 U.S.C.A. p. 5 states:

"In determining the meaning of any Act or resolution of Congress * * * the word 'person' may extend and be applied to partnerships and corporations * * *, unless the context shows that such words were intended to be used in a more limited sense; * * *. This section is derived from Act of June 30, 1864, c. 173, 13 Stat. 258, 287; Act of July 13, 1866, c. 184, 14 Stat. 163; Act of July 20, 1868, c. 186, 15 Stat. 166; Act of Feb. 25, 1871, c. 71, 16 Stat. 431. It was incorporated in the Revised Statutes as §1."

"3. 'Person'—'Person' is defined in a number of cases scattered throughout this work under the specific statute to which it relates. The general index is a guide to those cases."

"Cited without specific application is Railroad Tax Cases (C.C.Cal. 1882) 13 F. 724 (concurring opinion), writ of error dismissed *County of San Mateo* v. *Southern Pac. R. Co.* (1885) 6 S. Ct. 317, 116 U.S. 138, 29 L.Ed. 589." p. 6.

Title 1 Section 1 U.S.C.A. (1963 Cumulative Annual Pocket Part (for use during 1964), pp. 4-5) notes:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise—• • • the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; • • •" July 30, 1947, c. 388, §1, 61 Stat. 633, amended June 25, 1948, c. 645, §6, 62 Stat. 859; Oct. 31, 1951, c. 655, § 1, 65 Stat. 710."

"*'1948 Amendment.* Act June 25, 1948, cited to text, amended section to include within the definitions the words 'tense', 'whoever', 'signature', 'subscription', and 'writing' and a broader definition of the term 'person'."

"*'Effective date.* Section 20 of Act of June 25, 1948, cited to text provided that the amendment of this section should be effective as of September 1, 1948.'"

"3. *Person*

Where Congress made express provision in this section for the term 'person' to extend to partnerships and corporations and to associations, the absence of any comparable provisions in the Norris-La Guardia Act, section 101-115 of Title 29, extending the term to sovereign governments implied that Congress did not desire the term to extend to them. *U.S.* v. *United Mine Workers of America*, 1947, 67 S.Ct. 677, 330 U.S. 258, 91 L. Ed. 884."

In *United States* v. *Fox*, 1876, 94 U.S. 316, 321, the court said:

> "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation, —but cannot be so extended to include within its meaning the Federal government. It would require an express definition to that effect to give it a service thus extended."

United States v. *Cooper Corp.*, 1940, 312 U.S. 600, 604-5, 606, 607, the court said:

> "Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name. * * * The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasize the fact that if the United States was intended to be included Congress would have so provided expressly."

In *United States* v. *Mine Workers*, 1946, 330 U.S. 258, 275, the court said:

> "The Act does not define 'persons'. In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provision, R.S. § 1, 1 U.S.C. §1, for the term to extend to partnerships and corporations, and in §13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them."

At page 276, the court said:

> "We think that Congress' failure to refer to the United States or to specify any role which it might commonly be thought to fill is strong indication that it did not intend that the act should apply to situations in which the United States appears as employer."

In *Title Guaranty & Surety Co.* v. *Guarantee Title & T. Co.*, 1909, 174 Fed. 385, 387, the court said:

> "In the first point [whether the United States is included in the word 'person'] the authorities are uniform that the sovereign is not included by the general language of the statute. Moreover, that such was the intent of the act will appear in section 1, ch. 19, where a more inclusive meaning is given to the word 'person'. Such inclusion goes no further than 'corporations * * * and officers, partnerships and women.' It therefore unquestionably follows that by the passage of the bankrupt act there was no intent by the use of the word 'person' in subdivision 5, to sustain, diminish, or affect the existing priority open to debtors of the United States under Rev. St. 3466."

In *Davis* v. *Pringle*, 1924, 1 F. 2d 860, 863, the court said:

> "The failure to include the United States and the states in the definition could not have been inadvertent. The United States and the several states of the Union are not persons, and are not commonly thought of as persons, and if it had been intended that 'persons' should have such a comprehensive and unusual meaning to include them, the framers of the definition would have said so."

It seems obvious under the cases cited and quoted that neither the United States nor an agency of the United States is a person within the meaning of that term as used in any of the statutes under discussion. If Congress had any intention that it should, it would have said so.

The following cases cited by the Court in its opinion are not applicable here for two reasons. In the first place, in each case cited, the sovereign to whom the act was held applicable was a sovereign *other* than the sovereign enacting the statute. In the second place, in each case cited, the sovereign to whom the statute was held applicable was engaged in a *non-governmental* activity.

In *Georgia* v. *Evans*, 316 U.S. 159 (1942), the statute interpreted was a Federal price control statute, prohibiting certain conduct and providing a remedy for the United States and private persons as a means of enforcing the prohibition by the Federal Government. We have a situation where the government involved was a government *other* than the United States, and the state, since it was not enforcing its own legislation, and was merely doing what any private person could have done, was acting in a private capacity.

In *United States* v. *California*, 297 U.S. 175 (1936), the statute involved was a Federal Statute, and the state was acting as a "common carrier engaged in interstate commerce by railroad." Again we have a situation where the government involved was a government *other* than the United States, and the state engaging in a private business was acting in a private capacity. The case is not authority for the proposition that the United States itself would have been a person within the meaning of the statute had it been engaged in a private business as a "common carrier engaged in interstate commerce by railroad."

In *Ohio* v. *Helving*, 292 U.S. 360 (1934), the statute interpreted was a Federal tax statute imposing a tax on "persons" and "corporations" engaged in the sale of

non-intoxicating liquors. Again we have a situation where the Government involved was a government other than the United States, and the state engaging in a private business was performing a non-governmental function. The case, therefore, is not authority for the proposition that the United States would have been a "person" within the meaning of that statute had it been engaged in the sale of non-intoxicating liquors.

In *Burke* v. *Railroad Retirement Board*, 165 F. 2d 24, the governmental unit involved was the Orphans' Court of Allegheny County, Pennsylvania. Again the government involved is a government *other* than the sovereign enacting the legislation. But the case does not fit into the pattern that the *other* government must be acting in a private capacity since the Orphans' Court was performing a governmental function. In view of the cases previously discussed, we can only conclude that the case was erroneously decided. But the decision is perfectly consistent with our basic theory that the Railroad Retirement Act is not applicable to the United States since it is the enacting sovereign.

II.

The Act Deprives Petitioner Of His Property Without Due Process Of Law In Violation Of The Fifth Amendment.

Section 2 of the Act, Title 45, Section 229, U.S.C. provides, in part, as follows:

> "(a) The following-described individuals • • • shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1(a) [of the Act] • • •"
>
> • • • • •

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person to whom he was last employed * * *"

"(c) An annuity shall begin to accrue as of a date to be specified in a written application * * * but—

(1) not before the date following the last day of compensated service of the applicant * * *

"(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. * * *" (Title 45, Section 228b (a) (b) (c) (d) U.S.C.A.)

The Court of Appeals in its opinion states:

"* * * the cessation of service provisions of Section 2 which are the subject of petitioner's complaint have been a part of the Act since its enactment in 1937. No previously vested right was disturbed by the provision."

This is not correct.

The Railroad Retirement Act was adopted in 1935. It was replaced by the Railroad Retirement Act of 1937. The Railroad Retirement Act of 1935 did not make any provision requiring a railroad employee to cease other employment as a condition of receiving his pension. True, the Railroad Retirement Act of 1935 was repealed and under 50 Stat. 435, 440, all sums deducted by employers from the compensation of employees as and for taxes under the Act were refunded to them or applied to payment of taxes under the Railroad Retirement Act of 1937, but that was a voluntary act by the United States, a gift of the payments made under the Railroad Retirement Act of 1935 to the railroad employees, and did not

terminate the contractual obligation to pay an annuity incurred by the Railroad Retirement Board by their performance of their employment contracts with the railroads under that Act, especially in view of the fact that the government had the use of the money, interest free, during the period it retained it, 50 Stat. 435, 440, expressly providing: "No interest shall be allowed or paid with respect to any sum refunded, credited, or repaid under the provisions of this section." In other words, the original contract was not rescinded by the return or credit on other taxes of the money paid. Petitioner, and others similarly situated, continued their employment in the railroad industry during 1935 and 1936 in expectation that the benefits that were part of their employment contracts under the Railroad Retirement Act of 1935 were accruing and would continue to accrue until the termination of their employment in the railroad industry and would continue to accrue until they reached retirement age under its provisions and without being required to quit any other employment. This was a vested right of which they could not be divested by statute or a statutory gift. More than money and use of money was involved. The time that they spent working for the railroad, and the work that they did, could not be refunded. Their annuity was part of their wages without which they did not receive full compensation for their services.

The fundamental error made by the Court is in its insistence that because the Railroad Retirement Act is legislative in origin its provisions are not contractual in nature and may be changed retroactively at any time. Such is not the case.

In the first place, an annuity is, by definition, contractual in nature.

Vance on Insurance, Third Edition (Anderson) states:

> "The common-law definition of an annuity is generally stated to be 'a yearly sum stipulated to be paid to another in fee, or for life or years and chargeable only on the person of the grantor.' (Bouvier's Law Dictionary, Third Revision, p. 201) The definition in general use is, however, much broader and includes contracts to make periodic payments at monthly or other intervals, or is usually the case of annuity contracts issued by life insurance companies." p. 279.
>
> "The annuity may be on an individual basis or the contract may provide annuities for a group. The group annuity contract is a highly satisfactory method of providing retirement benefits for sizable groups of employees and the number of employees now covered by such contracts is large." p. 1022.

In the second place, the annuity under consideration is, in fact, contractual in nature.

Under the Railroad Retirement Act the annuities are based on the employee's contributions to the Retirement fund. In *Scott* v. *Railroad Retirement Board,* 227 F. 2d 684, 636 (1955), the court said:

> "Such annuities are paid from a fund to which the employees and the railroads have contributed equally on all salaries of employees earned after December 31, 1936. * * * The fund is set up on an acturial basis and should not be dissipated by payment of annuities to those who are not covered by the Act and who have made no contribution to the fund."

Under the Civil Service Retirement Act and under the Social Security Act the benefits are based on the employee's earnings record and his years of service and

are not contractual in nature. In *Stouper* v. *Jones,* 284 F. 2d 240, 243 (1960), the court said:

> "With respect to the Social Security Act • • • 'eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contributions to the program through the payment of taxes, but rather on the earnings record of the primary beneficiary.' • • • 'the non-contractual interest of an employee covered by the Act cannot be soundly analogous to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments'. In like manner benefits under the Civil Service Act are not based on the employee's contribution to the retirement fund, but instead on the employee's earnings record and his years of service."

Accordingly, the annuities payable under the Railroad Retirement Act are contractual in nature, and those payable under the Civil Service Retirement Act and under the Social Security Act are not.

In spite of that fact the Court of Appeals, without citing any case or other authority in support of its position, asserts that the factors stated in support of the proposition that benefits under the Railroad Retirement Act are contractual in nature "are not determinative of the nature of the right to benefits, and participation in the retirement system is compulsory, a condition of employment, not optional, and the rights involved are statutory, not contractual in nature." This conclusion, we submit, is untenable, for the reasons above stated.

In the third place, it does not follow that because a given provision is statutory in origin, it is not contractual in application.

For while, in *Railroad Retirement Board* v. *Alton R. Co.*, 1934, 295 U.S. 330, Mr. Justice Roberts said that the Act was "an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee." (p. 357), and Mr. Chief Justice Hughes, in the dissenting opinion, summarizing the argument of the majority, said:

> "In substance, it is that the relation of the carriers and their employees is the subject of contract; that the contract prescribes the work and the compensation; and that a compulsory pension plan is an attempt for social ends to impose upon the relation non-contractual incidents in order to insure to employees protection in their old age." (p. 381)

and added that:

> "The range of existing federal regulations of interstate carriers affords many illustrations of the imposition upon the employer-employee relation of non-contractual incidents for social ends." (p. 381)

they did not say that once imposed by statute that thereafter it is not contractual in nature between the parties upon whom it is imposed.

In fact the contrary conclusion is implicit in both the majority and dissenting opinions.

Mr. Justice Roberts said that the legislative plan was "a joint adventure with mutuality of obligation and benefit.", and that "The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce." (p. 357) Mr. Chief Justice Hughes said:

> "Voluntary plans may have the defect of being voluntary, of being subject to curtailment or withdrawal at will. And the danger of such curtailment or aban-

> donment, with consequent frustration of the hopes of a vast number of railroad members and its effect on labor relations in this enterprise of outstanding national importance, might well be considered as an additional reason for the adoption of a compulsory plan." (p. 380),

and

> "A close analogy to the provision of a pension plan is suggested by familiar examples of compensation acts. * * * If Congress may supply a uniform rule in the one case, why not in the other? * * * Compensation acts do not simply readjust old burdens and benefits. They add new ones, outside the former burdens and benefits, and thus in truth add a new incident to the relation of employer and employee." (381-4)

Mr. Justice Roberts in the majority opinion (pp. 353-4), and Mr. Chief Justice Hughes (p. 389) in the dissenting opinion, concurred in the conclusion that that portion of the Railroad Retirement Act which was retroactive in nature and changed the original contract of employment between the railroad and the employee was unconstitutional as a denial of due process of law. Hence, the amendment to the Railroad Retirement Act requiring an employee to retire from any other employment as a condition of receiving an annuity under the Act, retroactively applied, as here, impairs the obligation of the employment contract between the railroad and the employee, depriving the employee of his property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States. See *McBride* v. *Allegheny Co. R. Bd.*, 1938, 350 Pa. 402, and *Bakerhus* v. *Seattle*, 1956, 46 Wn. (2d) 695, 296 P. (2d) 536, *Bower* v. *Los Angeles*, 118 Cal. App. (2d) 297, 257 P. (2d) 672.

In other words, it was the intention of Congress in enacting the Railroad Retirement Acts to force the railroad employers and employees to contract with reference to the pension plan on a permanent basis.

13 C.J. 560, 561, states:

> "The law of the place where the contract is entered into at the time of making the same is as much a part of the contract as though it were expressed or referred to therein. * * * Where the subject matter of a contract is exclusively one of a national cognizance, and congress has enacted a law for its complete regulation, the parties will be presumed to have contracted with reference to the Act of congress and its effect on the subject matter * * *."

In speaking of an analogous situation of an insurance policy, Vance states:

> "The applicable law, whether it be that of the place where the contract is made or that where it is to be performed, which governs a policy, absolutely determines the rights of the parties thereto. Neither can the parties by their stipulations either change or subvert the purpose of the law. Therefore it is properly said that the law writes into every contract all existing statutes that are applicable to the transaction, and they become parts of the contract as completely as if the parties had copied them in full or its face. And, further, these terms render null and void any other provisions agreed upon by the parties which may be in conflict with what is thus written in by the hand of the law." Vance on Insurance, 3rd Ed. (Anderson), p. 279.

See also 4 Williston On Contracts, 3rd Ed., (Jaeger), Sec. 615, pp. 597-630, Supp. pp. 14-15.

It follows that the Railroad Retirement Act is a part of every employment contract in the railroad industry and

that in entering into the employment contract the employee and the employer have entered into a contract of adhesion as far as the provisions of the Railroad Retirement Act are concerned.

The situation here is similar to the situation that confronted the Court in *McBride* v. *Allegheny Co. R. Bd*, 1938, 350 Pa. 402, where the legislature retroactively attempted to limit retired county personnel from Federal or State Government employment by enacting the following statute:

> "If any member of the retirement system is receiving a retirement allowance and he or she shall or may hereafter be employed by the government of the United States, or the Commonwealth of Pennsylvania, or any political subdivision thereof, then the retirement board shall, and is hereby given the authority to, suspend the retirement allowance to such member of the retirement system during such employment."

The validity of the statute was not attacked on the ground that it was contrary to public policy, which we insist that it is, but solely on the ground that it was invalid in its application to an employee who had become eligible for retirement pay and who is subsequently employed by a different branch of the state government. The Court sustained the attack.

The case is distinguishable from the present case solely by the fact that the employee's right to a pension had already been completely established before the statute was enacted while here the statute went into effect before his retirement rights had become vested completely.

But the distinction is without a difference.

In *Bakenhus* v. *Seattle*, 1956, 46 Wn. (2d) 695, 296 P. (2d) 536, the court held that a policeman who, under the pension system provided by law when he entered his employment, was entitled to receive one half of the salary which he received during the last year before his retirement, and who has complied with the provisions of his contract, cannot be deprived of his right to a pension so calculated by subsequent legislation which limited the total amount payable to a pensioner to $125 per month, where it appears that, by such legislation, approximately one third of his anticipated pension was removed with no corresponding benefit, and there is no showing that the reduction was necessary to preserve and perfect the system, or that it bore any reasonable relation to the purposes of the pension plan.

The Court said:

> "There are cases which hold that, since the right to receive a pension does not arise until all the conditions are fulfilled the employee's rights must depend upon the law as it exists at that time. This view is insupportable. Unless the services are rendered in reliance on an offer, they are consideration for nothing, and any pension received thereafter can only be a gratuity. The promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise." (p. 700)

The Court also said:

> "Until he had established his right to receive a pension by fulfilling the conditions, he could show no injury to himself by subsequent legislative changes and consequently could not complain. By waiting until those conditions were fulfilled, he has not lost his right to assert that he has been deprived of his rights by that legislation." (p. 703)

The situation is comparable to the situation in the present case where Congress has, if the construction placed on the act by the administrative agency is correct, sought to accomplish the same purpose by requiring an employee who started to make payments under a plan that would permit him to accept Federal or other employment before, at, and after he retired without prejudice to his annuity, to abandon and not return to such employment on pain of forfeiting his annuity while he was engaged in it, to the benefit of the fund.

In *Bowen* v. *Los Angeles,* 118 Cal. App. (2d) 297, 257 P. (2d) 672, the court said:

> "Pension rights, such as those here involved, are contractual in nature and they become vested at the time the employee enters the public service."

See also *Atlanta* v. *Anglin,* 209 Ga. 170, 71 S.E. (2d) 419.

A former railroad employee under the Act, gainfully employed elsewhere, must quit his job, whatever it may be, in addition to reaching retirement age, in order to secure his annuity under the Act, although having once done so he is free to take another job outside the industry without prejudice to his right to his annuity, making him do more than a person who has never worked outside the industry in order to secure the annuity, and placing the latter in a preferred position in the labor market since he is free to take any employment he can get outside the industry, perhaps the very job the former railroad employee has had to surrender, while the former employee is limited to the extent of one employer in the employment he may seek. When the United States is held to be a person, and the person by whom he was last employed, the number of job possibilities closed to the former

employee is tremendous and puts the employee who has never worked outside the industry prior to retirement in an even better competitive position.

Section 228b of the Act, construed as the Retirement Board has construed it, is arbitrary and unreasonable and contrary to public policy in requiring Petitioner and others similarly situated to abandon any "other employment" engaged in at or prior to the date on which an annuity would otherwise begin to accrue, if such employment would be permitted if it were entered into subsequent to that date. This is true because they have no choice except to continue working and foregoing their annuity or to quit and take their pension, depriving them of their pension on the one hand or their right to work on the other.

In *United States* v. *Bush*, 255 F. 2d 791, the court said:

> "However even more fundamentally is the fact that section 2(a) creates no distinction between casual and regular employment. The exact language of the Section precludes the rendition of 'compensable service to any person.' Thus if an employee has more than one employer at the time of his retirement he must stop performing compensated service to all. The legislative history of section 2 is also significant. In view of the limited resources available for retirement benefits Congress believed that if participation in such benefits was to be confined to those who had completely retired from the labor market as distinguished from those who were still employed a more generous provision could be made for a group which was completely reliant upon retirement benefits. Accordingly it was suggested that the Railroad Retirement Act of 1937 contain a provision which would prevent an annuity in respect to any month during which an annuitant was engaged in regular gainful employ-

ment. However, it was also recognized that under the proposed legislation some retired railroad men might require moneys in addition to pensions and that therefore they should be permitted to find work after retirement.

A compromise was arrived at whereby Congress gave expression both to the consideration that retirement benefits should be confined to those genuinely retired and to the counter-vailing consideration that some supplementation of retirement income through post retirement employment might be desirable. The former principle was expressed in the requirement of an absolute cessation of all gainful employment and the relinquishment of all right to return to such employment if such right existed, *viz.*, 2(a) 2(b); the latter was expressed in the provision permitting such employment that the annuitant might be able to find from sources other than the person or persons by whom he was employed at the time his annuity began to accrue; *viz.*, Section 2(d). It will be noted that the whole section 2(d) permits the annuitant to engage in employment after he has completely retired from the labor market, that employment may not be for the person or persons by whom he was employed at the accrual of his annuity.

It was believed that under the employment conditions as they existed in 1937 individuals who gave up their current employment and were not allowed to return thereto would not be likely to secure other jobs, and therefore the act was weighted on the side of requiring complete and permanent retirement from the labor market with maximum benefits possible for for the dependent retired group.

That the purpose behind this plan has been realized is indicated by the fact that the average age of retirement is now slightly over 68 even though the Railroad Retirement Act provided for retirement at age 65. The realization that a retirement at 65 years of age will result in an income reduction causes a

substantial number of railroad employers to continue to engage in railroad services. As a consequence the postponement of retirement results in a savings to the Railroad Retirement fund of an estimated $65,000,000 annually.

If an employee could obtain some railroad employment before retiring and could retire from railroad employment with the assurance that he could keep such job with its additional income, the employee doubtless would hasten his retirement. The result of this would obviously be a diminution of the available fund or a revision in tax rates levied for the support of retirement benefit payments. It is therefore clear to us that Congress could not have intended the exception (casual employment) engrafted upon the Railroad Retirement Act by the Court below."

The economic factor, therefore, that caused Congress to enact the legislation complained of was the depression. Its intent was to force railroad personnel to defer their employment as long as possible by making it difficult to find other employment in or out of the railroad industry to supplement their retirement income with the result there was a greater increase in the number of other jobs available for unemployed people and a conservation of the pension fund as a result of retaining money in the fund that otherwise would have had to have been paid out in annuities to retired railroad employees. There were two things legally and morally wrong with the law enacted by Congress: It deprived a railroad employee of his right to retire at the earliest date he had a legal right to retire in compliance with the contract, in effect repudiating the contract that each railroad and every railroad employee had entered into with the United States in regard to retirement benefits. In the second place, it violated the implied condition of that contract that

every railroad employee who was party to the contract would have the right to work outside the railroad industry without restriction. Furthermore, the legislation was illegal and immoral in that it made the latest "other employment" a bar to an annuity without regard to the length of time it has been engaged in alone or in reference to other previous "other employment" or the amount of money earned therein or the size of the employer or the number of jobs it has to offer or the degree of control or influence it has on the labor market, or the ability of the employee to secure other "other employment", and giving a retired railroad employee who has never engaged in "other employment" an unfair advantage in the labor market over the one who has done so, particularly where the last employer is one who engages in such a vast scope of business that to bar employment by it is in effect to bar any employment whatsoever. Furthermore, the act is illegal and immoral in that it prohibits such employment at the very time when due to age the employee is unable to acquire or adapt himself to a new employment, taking advantage of the march of time to the detriment of the very person entitled to be benefited by the act. Also, it is illegal and immoral in that the prohibition is made without regard to the value of the "other employment" to the United States or the community at large.

The requirement that they cease their last employment outside of the railroad industry, as well as their employment in that industry, to collect their annuity under the Act, is also an attempt to regulate private employment having no connection with the railroad industry or interstate commerce. The fact that if the employment

were entered into for the first time after retirement from the railroad industry, it would have no effect on their right to draw a pension under the Act, clearly shows that there is presently no economic or other justification for the provision whatsoever.

The requirement that an employee must retire from his latest "other employment" to secure his pension is unconscionable in that it enables an employee familiar with the provisions of the Act to insure that his last employer is engaged in a business other than the latest profitable "other business" in which he has been engaged before retirement, while the employee who is not familiar with the provisions of the Act complained of blindly assumes the Act does not bar other employment by the Government, as here, and does not cover up, and finds that he has barred himself for life from working for the United States, the largest single employer in the nation if taken as one entity, or takes such employment subject to forfeiture of his pension while engaged therein, regardless of his need for the employment and the pension.

It is submitted that the requirement complained of impairs the obligation of a valid contract in its express provision that the employee is entitled to retire without restriction on his pension rights the earliest moment he is entitled to retire under the pension plan as written or the original legislation accepted by the employment governing his retirement benefits, and the inherent right to work in the absence of a contract not to do so, and in its implied condition that he will not be fettered by legislative action in doing so, in the absence of a new agreement and a new consideration.

Accordingly, the act as construed by the Retirement Board is arbitrary and unreasonable and contrary to public policy and unconstitutional as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment in requiring petitioner and others similarly situated to abandon any "other employment" engaged in at or prior to the date on which an annuity would otherwise begin to accrue.

III.

Applying The Ordinary Rules Of Statutory Construction, The Federal Agency Rather Than The United States Would Be The "Last Person" Employing Petitioner Under The Act.

There is no doubt that, *for certain purposes*, the employee of any department or agency of the Federal Government, is an employee of the Federal Government. An employee of the Army is, for civil service payment and sick leave purposes, an employee of the United States. And, for purposes of administration of the Railroad Retirement Act and the Railroad Unemployment Insurance Act and administrative review of its decisions, the Railroad Retirement Board is an employee of the United States. And, for purposes of loyalty oaths, Post Office Department employees are employees of the United States. And, for purposes of civil service classification and discharge, Bureau of Engraving and Printing employees are employees of the United States. All this is beside the point.

The only question is, "Is the United States intended to be an 'employer' within the meaning of the Railroad Retirement Act?"

It is our contention it is not. We take this position, because of the hardship resulting from a retroactive construction of the word "person" to include the United States itself rather than its agencies because of the wide variety of enterprises in which it is engaged through its multitudinous agencies, necessarily drastically limiting a retired railroad employee whose "last person" employer happens to be the United States in available work, and putting him under a handicap in his competition with other retired railroad employees fortunate enough not to have been trapped into the position petitioner, and undoubtedly many other retired railroad employees, have been trapped by the poor wording of the Act and the administrative interpretation that has been put on it by the Railroad Retirement Board, the "agency" and not the United States should be held to be the "last person" employer within the meaning of the Act. In support of this contention, counsel points out the usual rules of statutory and contractual interpretation that the statute or contract under consideration should be construed most strongly against the person who wrote it, *i.e.*, the United States; that it must be construed in a fair and reasonable manner consonant with public policy, assuming words to be used in their ordinary sense in the absence of any context showing a contrary legislative intent; and in accord with the letter and spirit of the Constitution of the United States; and as not to deprive a person of his right to work and his right to obtain the benefit of his contract, in the absence of any clear congressional intention to the contrary.

In *McBride* v. *Retirement Board of Allegheny County*, 1938, 330 Pa. 402, 408-9, 199 A. 130, cited and quoted under Point II, the Court said:

> "Where one has been employed by any one of the units of government, has been placed upon the retired list, and is then re-employed by the same political unit, there is much room for argument that he should not be entitled to recover a retirement allowance and compensation on his return to service. These laws must be construed equitably in the interest of the State and the employee. It is evident the Retirement Act did not intend a different result, and that one re-employed in the same position from which he had retired cannot be considered 'retired'. Nor would he be retired if employed by the same unit of government. But here McBride was not re-employed by his former employer, the county; he was employed by a different unit, the State."

It held that the statute as originally enacted treated the county and the state as two different employers and that an amendment to the statute enacted after an employee had once started to make contributions under it that sought to deprive him of his pension rights in the event he was employed by a different unit of the state after he retired, which he was, was unconstitutional as depriving him of a vested right, leaving the validity of the section as applied prospectively to one being eligible for retirement in the future to be decided later.

In all equity and good conscience, the various Federal agencies rather than the United States must be the "last person" employing petitioner under the Act if the provisions complained of are construed in the light of the rules of construction stated.

CONCLUSION.

Wherefore, Petitioner prays that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed, and the decision of the Railroad Retirement Board entered July 31, 1962, be set aside, and in lieu thereof, this Court enter a judgment ordering said Board to pay to the Petitioner the railroad retirement benefits he applied for, or in the event it concludes that the construction placed on the statutory provisions complained of by said Board is the construction Congress intended, that it declare said provisions to be null and void and of no effect as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment, and grant the same relief.

Respectfully submitted,

ANTHONY DIGRAZIA,
HARRY A. CARLSON,
HUGH M. MATCHETT,
Attorneys for Petitioner.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

No. 14744
DAVID A. RUHL,
Petitioner

v.

RAILROAD RETIREMENT BOARD,
Respondent

On Petition to Review Decision of the Railroad Retirement Board.

FEBRUARY 24, 1965

Before CASTLE, *Acting Chief Judge,* SCHNACKENBERG and SWYGERT, *Circuit Judges.*

CASTLE, *Acting Chief Judge.* This matter is before the Court upon the petition of David A. Ruhl to review and set aside a decision of the Railroad Retirement Board denying petitioner's application for an annuity under the Railroad Retirement Act of 1937 (45 U.S.C.A. §§228a-228z-1).[1] Jurisdiction is predicated upon 45 U.S.C.A. §228k which incorporates the judicial review provisions of 45 U.S.C.A. §355(f).

The Board determined petitioner last worked for a railroad in March 1948 and that he has been employed by the United States since 1953. The Board concluded that petitioner was not entitled to an annuity under the Act until he ceased to render compensated service for

[1] Referred to herein as the "Act".

the government and relinquished all his rights to return to such employment.

The Board bases its decision on the application of Sections 2(a) and (b) of the Act (45 U.S.C.A. §§228b(a) and (b) which provide,[2] respectively, that an individual must cease compensated service to "any person", whether or not an "employer" as defined in the Act, before he is eligible for an annuity, and that he must relinquish all rights to return to the service of an "employer" and of the "person" by whom he was last employed in order to receive payment of the annuity.

Petitioner filed his application for an annuity on January 29, 1962. At that time he was employed by the United States Army Ordnance Corps. By a change effected through an internal reorganization of the Department of the Army he ceased working for the United States Army Ordnance Corps on July 31, 1962 and commenced working for the United States Army Munitions Command on August 1, 1962. The employment was at the same location and involved similar work. The application was denied August 20, 1962.[3]

Petitioner asserts the Board erred in denying his application for an annuity. The contentions he advances in this connection precipitate the following contested issues:

(1) Is the United States a "person" within the meaning of Sections 2(a) and (b) of the Act?

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[2] These sections provide, in pertinent part, as follows:
"(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section): . . ."
"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; . . ."

[3] An appeal to the Appeals Council of the Railroad Retirement Board followed. The adverse decision of the Appeals Council was appealed to the Board which affirmed the decision of the Appeals Council on July 31, 1964.

(2) Does petitioner's current employment in the United States Army Munitions Command constitute employment by a "person" different from the United States Army Ordnance Corps, and does the termination of his services with the latter agency satisfy the requirements of Section 2(a) and (b) of the Act?

(3) Whether the provisions of Section 2 of the Act which require as a condition to payment of an annuity that an individual cease compensated service for "persons" other than "employers" covered under the Act are unconstitutional as violative of the due process clause of the Fifth Amendment to the Constitution of the United States.

Section 1(n) of the Act (45 U.S.C.A. §228a(n)) defines the term "person" for the purposes of the sections here involved as meaning "an individual, a partnership, an association, a joint-stock company, or a corporation". Whether the word "person" or "corporation" includes the United States depends upon the connection in which the word is found. *Ohio* v. *Helvering,* 292 U.S. 360, 370. In *Georgia* v. *Evans,* 316 U.S. 159, the Court in holding the State of Georgia is a "person" within the meaning of that term as defined in the Sherman Act, and was entitled to sue for treble damages thereunder, pointed out (p. 161) "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon its legislative environment". The Court distinguished its holding in *United States* v. *Cooper Corporation,* 312 U.S. 600, relied upon by petitioner in the instant matter, and observed that the interpretation in *Cooper* "was drawn from the structure of the Act, its legislative history, the practice under it, and past judicial expressions". The Court observed that *Cooper* did not hold that the word "person", abstractly considered, could not include a governmental body, but on the contrary recognized there is no hard and fast rule of exclusion, and factors such as purpose and legislative history of the statute may indicate an intent, by use of the term, to bring state or nation within the scope of the law.

In *United States* v. *California*, 297 U.S. 175, where it was held a state owned and operated railroad was a common carrier engaged in interstate commerce subject to the Federal Safety Appliance Act, it was stated (p. 186) that the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it is a presumption in aid to consistent construction of its statutes of the enacting sovereign when their purpose is in doubt but does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated, and that objectives which are plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial.

The legislative history of Section 2 of the Act as evidenced by the Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 1st Sess., on H.R. 6956, pp. 15-16, 42-44, 75 and 96, and as appraised in *United States* v. *Bush*, 3 Cir., 255 F. 2d 791, discloses the purpose of the Act was to spread employment through the retirement of superannuated employees; but also to make possible more generous benefits than otherwise could be provided from the limited resources available, by confining participation in benefits to those who had completely retired from the labor market, subject, however, to the countervailing consideration that some supplementation of retirement income through post-retirement employment might be desirable if the annuitant could find such employment from sources other than the person by whom he was employed at the accrual of his annuity.

The petitioner asserts that in the enactment of Section 2 of the Act it was a purpose and intent of Congress to force railroad personnel to defer their retirement as long as possible by making it difficult to find other employment in or out of the railroad industry to supplement their retirement income with the result there would be an increase in the number of other jobs available for

unemployed people as well as a conservation of the retirement fund.

The legislative purpose embodied in Section 2 of the Act convinces us Congress could not have intended to exclude employment by governmental bodies, including the United States, from the scope of employments which must be terminated with no right to return thereto before eligibility for an annuity is established and its payment may commence. Such governmental employments constitute too large a segment of the labor market to permit inference of any Congressional intent to exclude them. Realization of the purpose of Sections 2(a) and (b) would be substantially impaired by such an exclusion. We are therefore of the opinion that in keeping with the rationale of the decisions of the Supreme Court of the United States to which we have referred, and in consonance with the application of those principles as reflected by the conclusion reached in *Burke* v. *Railroad Retirement Board,* D.C., 165 F. 2d 24, the United States is a "person" within the meaning of Sections 2(a) and (b) of the Act.

And such conclusion is not at variance with *United States* v. *United Mine Workers of America,* 330 U.S. 258, relied upon by petitioner. No impairment of a sovereign right of the United States results therefrom. On the contrary, a policy and objective of the United States is carried out.

We perceive no merit in the petitioner's contention that his current employment with the United States Army Munitions Command is an employment by an employer other than was his employer in his preceding employment with the United States Army Ordnance Corps. It is obvious that in both cases the United States was and is his employer. The termination of his services with the Ordnance Corps did not satisfy the requirements of Sections 2(a) and (b). He remained in the employ of the United States in the Munitions Command. He did not change employers.

Petitioner assails the constitutionality of Section 2 of the Act on the ground its provisions violate due process. He contends the requirements of the Section are arbitrary and unreasonable, deprive him of vested property rights and of the liberty of contract without due process, and impair a contractual obligation. From the arguments petitioner advances in support of these contentions it appears he predicates all of them on a concept that his right to benefits is contractual in nature. In this connection he points to the observation made in *Scott v. Railroad Retirement Board,* 7 Cir., 227 F. 2d 684, 686, that the annuities under the Act "are paid from a fund to which the employees and the railroads have contributed equally on all salaries of employees earned after December 31, 1936" and "[t]he fund is set up on an actuarial basis". But those factors are not determinative of the nature of the right to benefits, and participation in the retirement system is compulsory, a condition of employment, not optional, and the rights involved are statutory, not contractual in nature. Moreover, the cessation of service provisions of Section 2 which are the subject of petitioner's complaint have been a part of the Act since its enactment in 1937. No previously vested right was distributed by the provisions. The justification for those provisions is set forth in *United States* v. *Bush, supra.* They have a reasonable basis in the light of the problems to be remedied and the purpose and object of the legislation. They do not unreasonably or arbitrarily discriminate and thereby offend the requirements of due process.

The decision of the Railroad Retirement Board is affirmed.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 350

DAVID A. RUHL, PETITIONER

v.

RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 342 F.2d 662 (Pet. App. 1a). The opinion of the Railroad Retirement Board is not reported but appears at page 2 of the record filed with this Court.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1965. Petitioner's timely motion for

rehearing was denied on April 5, 1965. The petition for a writ of certiorari was filed on July 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in affirming a decision of the Railroad Retirement Board that petitioner was not entitled to an annuity under the Railroad Retirement Act while he continued his employment with the United States government.

STATUTE INVOLVED

The pertinent portions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U.S.C. 228a-z, are set forth in the Appendix, *infra*, pp. 9-10.

STATEMENT

Under the Railroad Retirement Act, persons aged 65 or over who have completed ten years of railroad employment and have "ceased to render compensated service to any person" may be eligible for an annuity (45 U.S.C. 228b(a)). No annuity may begin to accrue, however, until the day after the applicant has ceased to render compensated service (45 U.S.C. 228b(c)(1)), and no payment may be made unless the applicant has "relinquished such rights as he may have to return to the service of * * * the person by whom he was last employed" (45 U.S.C. 228b(b)). Once an annuity has begun to accrue, one entitled thereto may engage in other employment, but not for

"the person by whom he was last employed" before the accrual date (45 U.S.C. 228b(a), (d)).

Petitioner, having completed ten years of railroad service in 1948, reached age 65 on March 3, 1961. At that time, and for the previous eight years, he was a civilian employee of the Ordnance Ammunition Command of the United States Army Ordnance Corps. On January 29, 1962, while still so employed, he applied for an annuity under the Act. His application was rejected by the Bureau of Retirement Claims on the ground that he could claim no annuity until he ceased work and relinquished any right to return to work for his last employer. A few months later, on August 1, 1962, the Department of Defense was reorganized and the functions of the Army Ordnance Corps were transferred to the newly established Army Materiel Command.[1] Petitioner's position with the Ordnance Corps was thereby abolished, but he was retained to perform essentially the same duties at the same post for the Materiel Command (Pet. App. 2a).

Thereafter, petitioner renewed his application for an annuity. In substance, he alleged that he had terminated his employment with the Army Ordnance Corps, had relinquished all rights to return to its

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[1] See Department of Defense Reorganization Order of January 10, 1962, set out as a note following 10 U.S.C. 3036 (1964 ed.), and Army General Order No. 46, dated July 25, 1962.

After the reorganization, the Army Munitions Command was established as a subordinate unit to the Army Materiel Command, performing the functions previously performed by the Ordnance Ammunition Command.

employ and had accepted a new position with a different employer, the Army Materiel Command. The Bureau of Retirement Claims rejected petitioner's renewed application on the same ground as it had rejected his first application. It ruled that petitioner was still working for his "last person" employer and could not claim an annuity until he left and relinquished his rights to that employment (Pet. 7). The Bureau's decision was affirmed by the Appeals Council of the Railroad Retirement Board (Pet. 7) and by the Board itself (Pet. 8). On direct review, under 45 U.S.C. 228k, the court of appeals affirmed.

ARGUMENT

1. Petitioner's first contention is that neither the Army Ordnance Corps nor the Army Materiel Command is a "person" within the meaning of the Railroad Retirement Act, because the Act's definition of "person" [2] does not expressly include the United States government. He argues, therefore, that he is neither rendering "compensated service to any person" nor serving the "last person by whom he was employed" within the meaning of the Act and is thus entitled to an annuity, notwithstanding the actual fact of his continuing full-time government job.

As this Court has pointed out, however, "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in

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[2] 45 U.S.C. 228a(n): "The term 'person' means an individual, a partnership, an association, a joint-stock company or a corporation."

which the word is found." *Ohio* v. *Helvering*, 292 U.S. 360, 370-371. See also *Georgia* v. *Evans*, 316 U.S. 159, 160-161; *Far East Conference* v. *United States*, 342 U.S. 570, 576; *Sims* v. *United States*, 359 U.S. 108, 112. In the context of the Railroad Retirement Act, it is clear that the government is a "person," employment by which must be relinquished before annuities may be paid. In requiring as a prerequisite to the receipt of a Railroad Retirement Act annuity that an applicant cease work for his "last person" employer, Congress sought to encourage older persons to retire from the regular labor force and thereby to make additional jobs available in the economy. In addition, Congress determined that restricting benefits to those who had retired from the labor market would result in the optimum use of the limited annuity funds available.[3] See *United States* v. *Bush*, 255 F. 2d 791, 793-794 (C.A. 3), reviewing the legislative history of the Act. As the court of appeals correctly ruled (Pet. App. 5a), to read the Act as exempting the vast number of government employees from the requirement of terminating and relinquishing future rights to their employment before becom-

[3] While Congress recognized the desirability of permitting annuitants to supplement their retirement benefits through post-retirement employment, it refused to sacrifice the primary goals mentioned above and thus restricted the payment of annuities to those who were no longer serving a railroad or their "last person" employer. In so doing, Congress recognized the fact that a new job undertaken after age 65 was not likely to be competed for by younger members of the labor force or to be highly remunerative (cf. Pet. App. 4a).

ing eligible for annuities would substantially impair its intended operation. Nothing in the Act or its history justifies such a construction. The only other court to consider the interpretation urged by petitioner has also rejected it. *Burke* v. *Railroad Retirement Board*, 165 F. 2d 24 (C.A.D.C.) (State employee). Moreover, as early as 1938, the Board interpreted "person" to apply to a governmental body (R. 107-116). This long-standing construction placed on the Act by the agency entrusted with its administration is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16.

2. Petitioner's second argument—that the "person" by whom he was last employed was the Army Ordnance Corps—is insubstantial. There is no difference relevant here between the Army Ordnance Corps and its successor, the Army Materiel Command, by which petitioner is currently employed. Each agency was organized as an integral constituent of the Department of the Army, and petitioner did substantially the same work in the same location both before and after the departmental reorganization. Under these circumstances, the Board and the court of appeals correctly found no basis for the view that petitioner ever "ceased to perform compensated services" for, or "relinquished" the right to return to, his last employer.

3. Petitioner's final argument is that the retirement prerequisites in the Act are unconstitutional because they deprive him, without just compensation, of an asserted contractual right to the annuities established under the Act. In the first place, Railroad

Retirement Act annuities are not contractual but statutory rights, *Murray* v. *Railroad Retirement Board*, 289 F. 2d 386 (C.A. 4), parallel to those later provided under the Social Security Act.[4] See S. Rep. No. 1710, 79th Cong., 2d Sess., Pt. 1, pp. 3-4 and Pt. 2, p. 18. As this Court held in rejecting a similar challenge to the Social Security Act, such statutory programs cannot properly be analogized to accrued or vested property rights. *Flemming* v. *Nestor*, 363 U.S. 603. Accord, *Bernstein* v. *Ribicoff*, 299 F. 2d 248 (C.A. 3), certiorari denied, 369 U.S. 887. The court below correctly applied that rule to the similar legislation in question here. In addition, we point out that the relevant provisions of the Railroad Retirement Act of 1937 have been in effect since its enactment and that all of petitioner's contributions to the annuity program have been made subject to the requirements of which he now complains. See Pet. 17-18, and 50 Stat 435, 440.

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[4] Indeed, in certain circumstances, railroad employment may be credited towards the accrual of Social Security benefits. 45 U.S.C. 228e(k).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965.

APPENDIX

The pertinent provisions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U.S.C. 228a-z, provide:

45 U.S.C. 228a. *Definitions.*

* * * *

(n) The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

* * * *

45 U.S.C. 228b. *Eligibility for annuities; time of accrual;* [*etc.*]

(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsections (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

* * * *

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivisions 4 and

5 of subsection (a) of this section prior to attaining age sixty-five.

(c) An annuity shall begin to accrue as of a date to be specified in a written application (to be made in such manner and form as may be prescribed by the Board and to be signed by the individual entitled thereto), but—

(1) not before the date following the last day of compensated service of the applicant, and

(2) not more than twelve months before the filing of the application.

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service.

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